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No. 80-2157

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANCHORAGE TIMES PUBLISHING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that a bargaining order was necessary to remedy fully petitioner's pervasive unfair labor practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-44) is reported at 637 F. 2d 1359. The decision and order of the National Labor Relations Board (Pet. App. D-1 to D-148) are reported at 237 N.L.R.B. 544.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1981. A petition for rehearing was denied on April 29, 1981. The petition for a writ of certiorari was filed on June 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth on pages 2-3 of the petition. Also relevant are the following provisions of the Act (29 U.S.C. 157 and 158(a)):

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. Petitioner publishes the principal newspaper in Anchorage, Alaska, and employs about 280 employees in five departments. In late summer 1976, a group of employees in petitioner's newsroom actively sought a union willing to represent employees in the accounting, advertising, circulation, and editorial departments. In mid-October 1976, this group succeeded in persuading the International Brotherhood of Electrical Workers, Local 1547, AFL-CIO ("the union"), to conduct an organizing campaign among petitioner's employees. (Pet. App. D-25 to D-26.) By mid-November 1976, the union had obtained authorization cards from a majority of the unit employees, and it filed with the Board a petition for a representation election (*id.* at D-3, D-30, D-133).

Petitioner responded to the union's organizing campaign, both before and after the election petition was filed, with a pervasive scheme of unfair labor practices designed to deter employees from supporting the union. These unfair labor practices included: coercive interrogations of employees about their union sympathies, conducted over a period of several months by various high-ranking company officials; surveillance and creating the impression of surveillance of union meetings; threatening employees with job loss if the union won the election; denying an employee (Ann Gabler) part-time work because of her support for the union; and granting 28 employees (15% of the bargaining unit) wage increases two days before the election after delaying or accelerating those increases in order to make them coincide with the election date. (Pet. App. D-88 to D-116, A-9 to A-33.) The union subsequently lost the January 20, 1977, election (*id.* at A-6 to A-7).

2. The Board concluded that these unfair labor practices were sufficient not only to warrant setting aside the election, but also to make it unlikely that a fair rerun election could be held, even with the aid of a traditional cease-and-desist order. Accordingly, the Board, finding that the union had obtained valid authorization cards from 97 of the 181 employees in the bargaining unit at the time the representation petition was filed, determined that under the criteria set out in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969), a bargaining order was an appropriate remedy for petitioner's unfair labor practices. (Pet. App. D-135 to D-148.)

The administrative law judge, whose decision was affirmed by the Board, explained (Pet. App. D-136 to D-137):

> The numerous and persistent acts of unlawful interrogation by higher level management, the selective hiring policy based upon unlawful questioning of job

> applicants or employees seeking to arrange employment interviews for job applicants, the use of employees to engage in surveillance, and the creating of an impression among employees that management was engaging in surveillance of their union and protected activities, as well as the threats of loss of employment are collectively sufficient to warrant a determination that a fair rerun election could not be held. Equally pernicious, in my judgment, is management's manipulative use of the wage review program to undermine [employee] support for the Union and influence the outcome of the election. It is reasonable to conclude that the total cumulative effect of these unfair labor practices, coupled with the additional unlawful refusal to employ Gabler on a part-time basis, will be a lasting one, and the conditions necessary for providing a fair expression of employee sentiment in a rerun election will not be achieved by a traditional cease and desist order.

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-44). The court rejected petitioner's assertion that the union had not obtained authorization cards from a majority of the employees, sustaining the Board's finding that the card solicitors had not represented that the cards were only for the purpose of obtaining an election (*id.* at A-36 to A-40). In upholding the Board's finding that the facts warranted a bargaining order, the court explained (*id.* at A-43 to A-44):

> The wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases—and decreases.

> In addition, we are not persuaded that the harmful effect of the Company's unfair labor practices has been dissipated by the fact that two of the Company's representatives who committed some of the unfair labor practices (supervisors King and Molenda) have left its employ. Several of the unfair labor practices were committed by high level management personnel who did not * * * choose to disavow their coercive conduct before the election. Moreover, the unlawful wage increases were granted by management, not by the departed supervisors. * * * Therefore, it appears unlikely that the effect on the employees of the unfair labor practices of management has been softened by the departure of two supervisors.

The court of appeals denied the company's petition for rehearing (Pet. App. B-1), and its petition for a stay of mandate pending disposition of the instant petition (*id.* at C-1 to C-2).

On June 22, 1981, Justice Rehnquist denied petitioner's further application for a stay of mandate.

ARGUMENT

1. Petitioner contends that the court of appeals improperly upheld the Board's bargaining order without considering "[t]he changed circumstances of turnover in employees and supervisors between the date of the election and the date of the NLRB's decision and order" (Pet. 11). This contention presents no issue warranting review by this Court.

a. The court below did consider petitioner's assertion (Pet. 8) that the termination of three supervisors who perpetrated some of the unlawful acts dissipated the need for a bargaining order. The court found, however, that "high level management personnel" who had committed unfair labor practices remained in petitioner's employ (Pet. App.

A-43 to A-44). Moreover, the court pointed out that the unlawful wage increases—the violation which it found most strongly to require a bargaining order remedy—were not granted by the departed supervisors (*ibid.*).

b. Petitioner's further contention that the bargaining order was unwarranted because of employee turnover is not properly presented here. Petitioner did not raise that issue before the Board, either prior to its decision or in a motion for reconsideration. Since petitioner has not shown any extraordinary circumstances excusing that failure, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from raising the issue before the court of appeals or before this Court. *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255 (1943).

Moreover, petitioner first raised this contention in the court of appeals in its petition for rehearing. Under established policy, this Court will not review legal issues not presented to or considered by the court of appeals. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 (1975). See also *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[1]

2. Thus, the only issue actually presented is whether, on this record, the Board reasonably concluded that a bargaining order was necessary to remedy fully petitioner's unfair

[1]Petitioner alleges (Pet. 7-8) certain facts concerning employee turnover. However, while petitioner appended a list to its petition for rehearing before the court of appeals (Pet. App. E-12 to E-22) which indicated that by the close of the hearing before the administrative law judge certain employees had left its employ, no evidence was introduced at that hearing on the issue of turnover. Similarly, there is no record support for petitioner's assertions as to turnover between May 10, 1978 and August 15, 1978 (the period between the ALJ decision and the Board decision). In view of its belated nature, the court of appeals did not abuse its discretion in denying petitioner's request, made for the first time in the petition for rehearing, that the case be remanded to the Board for an evidentiary hearing on changed circumstances.

labor practices. That issue, which involves only the application of established principles to the particular facts of this case, does not warrant further review.

In any event, a bargaining order was clearly justified here. As the Second Circuit explained in *NLRB* v. *Jamaica Towing, Inc.*, 632 F. 2d 208, 212-213 (1980):

> Certain violations have been regularly regarded by the Board and the courts as highly coercive. These are the so-called "hallmark" violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists. They include such employer misbehavior as the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of § 8(a)(3) of the Act. In such cases the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force. The actual use of a "stick" in the form of a plant closure, or the resort to physical force or discharge, pose no problem of assessing credibility or unlikelihood of implementation. They are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period. The prospect of unionization is not a sure safeguard against such tactics.
>
> * * * * *
>
> Similarly, the employer, by "remedying the very grievances which gave rise to the union interest, . . . destroy[s] for the moment at least the employees' need for

> greater strength . . . [so that] the employees can not be said to have been free to fairly appraise the value of unionization." [Footnotes and citations omitted.]

In the present case, there were several "hallmark" violations. Employees were threatened with job loss if the union won the election, and one employee was in fact denied part-time employment because of her support for the union. Moreover, two days before the election a substantial number of employees in the bargaining unit were granted wage increases, which were announced at that time solely to influence the outcome of the election.[2] As the Board explained in *Tower Records*, 182 N.L.R.B. 382, 387 (1970):

> A unilateral award of a wage increase by an employer following a union's demand for recognition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.

And, as the Board has pointed out in *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240, 1241 (1972), a bargaining order is particularly appropriate in these circumstances because "traditional remedies, which do not include a requirement that the wage increase be rescinded, cannot eradicate the impact of [the employer's] action."

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[2] *J.J. Newberry Co.* v. *NLRB*, 645 F. 2d 148, 153-154 (2d Cir. 1981) (Pet. 6 n.2), in which the court found that a wage increase, although a "hallmark" violation, did not warrant a bargaining order, is distinguishable. In the particular circumstances there, the court found that the increase would not have a coercive impact because it was not based on anti-union animus but was prompted by a higher wage rate established at a store newly opened by the employer. Here, petitioner's anti-union animus was clearly established and the wage increases were granted, or their timing was delayed or accelerated, for the purpose of influencing the election.

In sum, since the employer's unfair labor practices here had resulted in an atmosphere in which "any election * * * would not be likely to demonstrate the employees' true, undistorted desires," the Board properly issued a bargaining order on the basis of the majority support for the union previously reflected in the authorization cards. *NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 611.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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